itself, limited the rule in one respect only, namely, that the declarant must have been related to the person whose pedigree is in question. However, in *Jackson* v. *Etz* (1826) 5 Cowen, 314, this restriction was again lost sight of. The cases decided since that time showed no tendency to approach the well defined rule laid down by the English courts, and it was impossible to tell in advance in what cases hearsay evidence would be admitted or excluded. It was with a feeling of relief therefore, that lawyers welcomed the decisions of *Eisenlord* v. *Clum* (1891) 126 N. Y. 552, where PECKHAM, J., reviewed the English decisions, approving the rule they stated. While the declarations in the case were made by a relative of the plaintiff, the learned judge, by way of *dictum* approved of the holding of *Jackson* v. *Ross*, *supra*, in which declarations by acquaintances had been admitted. Hence it will be seen that the law of New York on the subject of pedigree has not yet been settled, though tentatively approaching the English rule.

In the recent case of *Washington* v. *Bank for Savings in the City of New York* (1901) 72 N. Y. Supp. 752, the plaintiff, as administrator of one Margaret Hunter, sued the defendant to recover two deposits made by the deceased "in trust for son Thomas and son John." To prove that his intestate never had any sons, the plaintiff was allowed to give in evidence, statements made by the deceased to the effect that she had never had any children. The court says that as it is a well settled rule of evidence that hearsay may be admitted to prove birth of issue, it follows, that the same kind of evidence is admissible to establish that a person never had issue, citing *People* v. *Fulton Fire Ins. Co.* (1840) 25 Wend. 205. There are *dicta* in that case, which tend toward such a result, but as all of the evidence was excluded on another ground, the case is not of much value as an authority. The holding in the principal case, however, while an extension of the rule, seems sound. The declarations of the deceased were logical evidence, and the best to be obtained under the circumstances.

But on another ground the evidence should not have been admitted, because the primary question at issue was not one of pedigree. *Conn. Life Ins. Co.* v. *Schwenk* (1876) 94 U. S. 593; *Haines* v. *Guthrie* (1884) 13 Q. B. D. 818. The evidence was not offered to prove parentage or descent. As said by PECKHAM, J., in *Eisenlord* v. *Clum*, *supra*, at p. 566: "Where these questions" (birth, parentage etc.) "are merely incidental and the judgment will simply establish a debt or a person's liability on a contract, or his proper settlement as a pauper and things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death or birth are incidentally inquired of." The error made in this case frequently occurs in courts of other States. *Morrill* v. *Foster* (1856) 33 N. H. 379; *Du Pont* v. *Davis* (1872) 30 Wis. 170; *In Re Hurlbut's Estate* (1896) 68 Vt. 366.

BANK-CHECKS AS AFFECTED BY THE DRAWER'S DEATH.—When the drawer of a bank-check dies before the check is presented for pay-

ment, the effect upon the positions of the holder and of the bank presents a question which has been discussed now and then by text-writers, but has seldom come up in court. It seems to be universally admitted that where the bank pays the check in ignorance of the death, the payment will stand and the bank will be allowed to charge it up against the drawer's account. 2 Pars. N. & B. 82; Morse on Banks, §400, n. 2. But if the bank have notice of the death before paying, opinion differs as to the course it should pursue; the question being closely associated with those of the right of the holder to sue the bank, and of the drawer to stop the payment, and depending with them on the legal significance of a check. This das been differently conceived of by different courts, and the differences are so radical that until they are extinguished the law of checks in many important particulars must vary according to the jurisdiction.

In a number of the States the courts have treated a check as an assignment, an out-and-out transfer of the depositor's credit, whereby the depositor steps out as to the amount of the check and the payee takes his place. *Munn* v. *Burch* (1860) 25 Ill. 21; *Fogarties* v. *State Bank* (S. C. 1860) 12 Rich. 518. The consequence is that as soon as the assignment is complete the payee has a right to sue the bank if it refuses to pay, and the drawer of the check cannot interfere with this right. In some of the States the assignment is complete when the check is given, and then the drawer can never stop payment, *Union Nat. Bank* v. *Oceana County Bank* (1875) 80 Ill. 212; in others it is not complete until presentation, and there the drawer can stop payment up to that time. *Tramell* v. *Bank* (1890) 11 Ky. Law Rep. 900.

The majority of jurisdictions have rejected the theory that a check works an assignment. Some courts say a check is a bill of exchange, and some that it is not, but most agree that it gives the holder no right against the bank untill it has been certified or paid. The New York courts and the English courts put this on the ground that the check is a bill of exchange and as such gives no right against the drawee until accepted. *Chapman* v. *White* (1852) 6 N. Y. 412; *Hopkinson* v. *Forster* (1874) L. R. 19 Eq. 74. The United States Supreme Court on the other hand denies that it is a bill, but reaches the same result. *Merchants Bank* v. *State Bank* (1869) 10 Wall. 604, 647; *Bank of the Republic* v. *Millard* (1869) 10 Wall. 152. The question is only one of names, however, for where the check is called a bill it is admitted to be only one species, and to differ from the ordinary bill in several important respects; for instance, the drawer is not entitled to notice of dishonor, and certification, unlike acceptance, discharges the drawer unconditionally. The holder in either case having no right to sue the bank, it follows that the drawer is entitled to stop the payment. *Dyker* v. *Leather Manufacturers' Bank* (1845) 11 Paige, 612.

Neither the assignment theory nor the bill of exchange theory seems entirely satisfactory. There is another which may be better and is certainly not forced. When the depositor opens an account

there is a contract implied in fact under which the bank is to repay its debt by payment to those persons whom the depositor shall afterwards designate. The check then is the designation of the person and as soon as it is presented the bank comes under a contract duty to the drawer to pay it. Where, then, a person benefited under a contract to which he is not a party is allowed to sue upon it, the holder might be allowed to sue the bank. This reasoning has been adopted in at least one State, though expressly rejected in another. *Roberts* v. *Austin* (1868) 26 Iowa, 315; *Cincinnati R. Co.* v. *Bank* (1896) 53 O. St. 117. Where, further, the beneficiary's right, once vested, cannot be prejudiced by the subsequent acts of the parties to the contract, of course the drawer of the check could not stop payment of it. If however the law gives the third party no rights whatever under the contract, the drawer could stop the payment.

The results which follow, under these various principles, from the drawer's countermand would seem to follow also from his death. Where the check works an assignment as soon as delivered to the payee, the drawer's death can have no effect. *Lewis* v. *International Bank* (1883) 13 Mo. App. 202; *McGregor* v. *Loomis* (1856) 1 Disney, 247 (before it was decided that a check is not an assignment in Ohio). But where the assignment is not complete until the check is presented, the bank's knowledge of the drawer's death ought to take away its right to pay, as though another assignment had been first notified to it; because as soon as the drawer is dead, the bank knows that his personal representatives are entitled to his claim. A Louisiana case, taken in connection with a *dictum* of the same court, seems to point to this result although the precise question was reserved. *Bernard* v. *Bank* (1891) 43 La. Ann. 50; *Burke* v. *Bishop* (1875) 27 La. Ann. 465. If the check is a designation under a contract which gives a third party an indefeasible right to sue on the contract, the drawer's death can have no effect. If the check is a bill of exchange, perhaps the drawer's death would not revoke the order; for it has been held that a drawee who accepted and paid a bill after he knew of the drawer's death might charge it up against the drawer's administrator. *Cutts* v. *Perkins* (1815) 12 Mass. 206. But this is not necessarily a precedent for the case of a check; for those courts which declare a check to be a bill of exchange admit that in many respects it it is governed by quite different principles, and though the New York court says that a check is a bill, there is a New York case which held that a draft drawn on a bank where no deposit was made until afterwards was revoked by the death of the drawer. *Fordred* v. *Seamen's Savings Bank* (1871) 10 Abb. Pr. N. S. 425.

Finally, what should be the rule if the check is neither an assignment nor a bill of exchange, and if the holder gets no right to sue on the contract between the bank and the depositor? The question here is of the right of the bank to pay the check and charge it up to the drawer's account. The trend of all the authorities is against the existence of such a right, *Fordred* v. *Seamen's Savings Bank, supra; dicta* in *Second Nat. Bank* v. *Williams* (1865) 13 Mich.

282; *National Commercial Bank* v. *Miller* (1884) 77 Ala. 168; and a late case in Kentucky holds that a check for more than the amount of the deposit is not an assignment, as checks ordinarily are in Kentucky, and is improperly paid after the bank knows of the drawer's death. *Weiand's Adm'r* v. *State Nat. Bank* (1901) 65 S. W. 617. Principle seems to be on the same side. The author of a recent paper on this subject argues that the drawer's death can make no difference because the check is merely a direction to the bank to do an act which will be the bank's act and not the drawer's; that this direction once made is complete unless actively revoked; and that the drawer's continued existence is therefore not necessary, as it would be for the creation of a contract or for an act of agency. 14 Harv. L. Rev. 588. But this reasoning, it is thought rests on half-truths only. While the payment is the bank's own act and not the drawer's, it is, if properly made, charged against the drawer's account; and the drawer's death necessarily substitutes the personal representative, as the one who alone has the right to direct a payment which the bank may charge against the account. This is the kernel of the matter. As soon as the depositor dies his debts and credits pass to his personal representatives, and the balance of assets go through them to those who may be entitled. New parties own the deposit, and the bank, knowing this, would have no right to create a new charge except on their order. The author of the paper referred to above argues here that the order of the drawer survives as the order of the personal representative; because "if it were not his order he could not countermand it, as no one can countermand an order not his own, but of course the personal representative of the deceased drawer can stop payment of the check by notice to the drawee not to pay it." P. 593. Such an argument begs the question, by assuming that the personal representative countermands the old order as the maker of it, rather than nullifies it by showing that he is the only person entitled. The situation is simply this, that the drawer's death has left his order a dead letter, and the bank's right to act under it is gone.

Another reason often given for the view that the drawer's death revokes the check is that it ends the bank's authority—"by the demise of the drawer his mandate to his agent, the bank, is revoked." *Burke* v. *Bishop, supra.* At first sight this language seems to show a misunderstanding of the relation of bank to depositor, which is not that of agent and principal, but of debtor and creditor; and accordingly it has been criticised in the above mentioned paper and in Morse on Banks, § 400. Its use is so common however that it may represent what is a real step in the theory of payment of a check. May it not be that a check is a call for the repayment of so much money to the depositor, and then a direction to pay it over as the depositor's agent?

The general question here discussed could not arise in England, where the Bills of Exchange Act of 1882 provides that "a banker's authority and duty to pay are determined by notice of the customer's death." Under the Massachusetts statute the check is not revoked

by the death of the drawer if presented within ten days of its date. Mr. Crawford, in his annotated edition of the New York Negotiable Instruments Law, p. 114, mentions that a similar provision was suggested for that statute, but was rejected. By § 321 a check is a bill of exchange except as otherwise provided, but it has not been decided whether this brings it within the doctrine of *Cutts* v. *Perkins*, *supra*. The fact that the bank is always safe in refusing payment after the death of the drawer, except in jurisdictions where the holder is allowed to sue, explains the absence of authority. The question still remains, both in the United States and in England, what would be necessary to charge the bank with notice of the drawer's death. In the recent Kentucky case the administrator himself gave notice.

THE JURISDICTION OF EQUITY IN CASES OF LIBEL.—Since an early date courts of equity have refused to take jurisdiction of cases of libel. *Huggonson's Case* (1742) 2 Atk. 469. The reason is that if the publication were enjoined the freedom of the press would be invaded. The doctrine has been followed in the English courts, with the exception of three cases: *Springhead Spinning Co.* v. *Riley* (1868) L. R. 6 Eq. 551; *Dixon* v. *Holden* (1869) L. R. 7 Eq. 488; *Rollins* v. *Hinks* (1872) L. R. 13 Eq. 355, decided by MALINS, V. C.; and these Lord CAIRNS, C., overruled in *Prudential Insurance Co.* v. *Knott* (1875) L. R. 10 Ch. App. 142. In 1839, in the case of *Brandreth* v. *Lance*, 8 Paige Ch. 24, Chancellor WALWORTH followed the English rule; and it has since that time been generally recognized in New York and elsewhere. 1 COLUMBIA LAW REVIEW, 198.

The recent case of *Marlin Fire Arms Co.* v. *Shields* (1902) 74 N. Y. Supp. 84, decided by the Appellate Division of the Supreme Court, First Department, is of interest, as seemingly breaking in upon this doctrine. The plaintiff had advertised in the defendant's magazine for a number of years. The defendant having raised his price to what was alleged to be an exorbitant rate, the plaintiff refused to advertise further. Thereupon the defendant, in order to compel the plaintiff to advertise, published in the columns of his magazine what purported to be letters written by sportsmen, charging falsely that there were mechanical defects in the plaintiff's rifles. These letters were in fact written by the defendant himself. The Special Term sustained the defendant's demurrer on the ground of lack of jurisdiction. This judgment is now reversed, one Justice dissenting. Mr. Justice HATCH, writing the opinion, argues that equity has jurisdiction because here there is an irreparable injury to the property rights of the plaintiff, such that an action at law will not give adequate relief. Even if HATCH, J., by this holding intended to recognize business reputation as property in the legal sense, there is here no actual, unlawful user of those rights by the defendant. It is only where a defendant makes an unlawful use of the plaintiff's property that equity will enjoin a libel, and then only by way of incidental relief. *Gee* v. *Pritchard*